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Review of application and implementation of the Set

Model Law on Competition (2015) – Revised chapter XI*

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Sanctions and relief

I. The imposition of sanctions, as appropriate, for:

(i) Violations of the law;

(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) Failure to supply in formation or documents required within the time limits specified;

(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.

II. Sanctions could include:

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

(iii) Interim orders or injunctions;

(iv) Permanent or long term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vi) Restitution to injured consumers;

(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

Commentaries on chapter XI and alternative approaches in existing legislation

Introduction[1]

1. Chapter XI of the Model Law on Competition deals with tools for competition law enforcement, namely sanctions and relief. The latter is more commonly referred to as remedies. Given the objective and the compulsory nature of competition laws, as well as commercial motivations for contravening them, sanctions and remedies are of particular importance. Safeguarding competition – the primary objective of most competition laws – requires companies to comply with compulsory provisions of a procedural or substantive nature. However, experience has shown that undertakings will comply with compulsory rules only if there is a high likelihood that non-compliance will be detected and, once detected, there is a high likelihood that sanctions will be imposed and that the direct and indirect cost of such sanctions will be commercially significant. As such, the threat of significant sanctions appears crucial for encouraging compliance with competition law. With respect to the primary objective of most competition laws, i.e. protecting the competitive process, remedies complement sanctions, since they aim at safeguarding or

[1] See TD/RBP/CONF.7/5.

restoring competition in cases where companies have distorted or are about to distort competition.

2. While the wording of chapter XI (II) may be understood to refer to sanctions only, it appears from the examples listed that this provision also covers remedies. For instance, the injunctions referred to in (II) (iii) and the orders to remedy a violation by positive conduct referred to in (II) (iv) are usually qualified as remedies. In addition, most competition laws provide for both of the two enforcement tools, which complement each other.

3. Sanctions and remedies are tools for public competition law enforcement, that is, for enforcement by public authorities, such as competition agencies and courts. Recently, well-established competition law regimes have begun to promote private enforcement through private actions by the victims of competition law violations, as a complement to public enforcement. This aspect of competition law enforcement does not fall under chapter XI, but is dealt with in the commentaries on chapter XIII.

I. The imposition of sanctions

Enforcement body vested with the power to impose sanctions

4. The power to impose sanctions may be vested either in the administering authority or in the judicial authority or may be divided between the two. In the latter case, for example, the administrative authority's power to impose a sanction might be limited to such conduct as refusals to supply information, the giving of false information or failure to modify agreements.

5. In India, Pakistan, Panama, Peru, the Russian Federation, Switzerland and the European Union, the administering bodies have powers to impose fines. In Australia, Thailand and the United States of America, the power to impose fines or other sanctions is vested in the courts.

Different types of sanctions

6. Sanctions may be imposed in the event of violation of a substantive provision of the competition law and of procedural violations, as noted in chapter XI (I) (iii) and (iv). For example, Austrian competition law provides for procedural sanctions in the event of false and/or misleading information in a merger notification and of false and/or misleading information or incomplete provision of information or non-compliance with a cartel court's order to provide information. Under Hungarian competition law, a procedural fine may be imposed on the party or other persons involved in the proceedings of a competition case and furthermore on persons obliged to provide assistance in clarifying the facts of the case if they engage in an act or display behaviour that is aimed at protracting the proceedings or preventing the disclosure of facts or which has such an effect.

7. Sanctions for contravention of substantive provisions may be of a civil, administrative or criminal nature. Administrative sanctions – in particular, fines – are the most common form of sanctions in cartel cases. Some legal systems provide for the possibility of imposing fines on individual competition law infringers in addition to those imposed on the undertaking on whose behalf they have acted. For example, in Germany, the competition law liability of an undertaking derives from the establishment of a competition law infringement by its management or employees. Other competition legislation only provides for the possibility of imposing fines on the companies in question. Besides fines, administrative sanctions may include prohibiting individuals from serving as

officers of public corporations and blacklisting companies involved in bid-rigging from future government tenders.

8. As opposed to administrative sanctions, which may be imposed by a competition authority, civil or criminal sanctions may only be decided upon by a court. Fines may have a civil, administrative or criminal nature, whereas imprisonment is exclusively criminal in nature. Some countries that opt for a system of administrative sanctions provide for criminal sanctions in specific competition cases, for example bid-rigging in government tenders organized by public authorities.

Alternative approaches in existing legislation

9. Alternative approaches in existing legislation to types of sanctions are detailed in table 1.

Table 1
Alternative approaches in existing legislation: Types of sanctions

	Sanctions						
	Civil		*Administrative*		*Criminal*		
Country or group	*Fines*	*Other*	*Fines*	*Other*	*Fines*	*Imprisonment*	*Other*
Armenia			X	X	Limited to severely anticompetitive behaviour		
Australia	X	X			X	X	
Brazil			X	X	X	X	
Canada			X	X	Limited to price fixing, market allocation and output restriction		
China			X	X			
Costa Rica			X	X			
Hungary			X	X			
Egypt		X	X	X	X		X
Ethiopia			X	X			
France			X	X	X	X	
Germany			X	X	Limited to bid-rigging		
India		X	X	X			
Indonesia			X	X	Law No. 5/1999 provides for several types of criminal sanctions, which are, however, not applied in practice		

Country or group	Sanctions						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprisonment	Other
Japan			X	X	X	X	
Kenya			X	X	X	X	
Mexico		X	X	X	Limited to severely anticompetitive behaviour		
Peru			X	X			
Republic of Korea			X	X	X	X	
Russia Federation			X	X		Federal law No. 216-FZ, 29 July 2009, introducing amendments to article 178 of the Criminal Code	
South Africa			X	X	X	X	
Thailand		X			X	X	
Tunisia			X	X	X	X	X
Turkey			X	X			
United Kingdom of Great Britain and Northern Ireland			X	X	X	X	X
United States	X	X		X	X	X	
Zambia			X		X	X	
European Union			Limited to undertakings No personal liability				

10. Chapter XI (II) of the Model Law on Competition lists different types of possible sanctions. Although the list includes the most common types of sanctions, it should not be considered as exhaustive.

Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity)

11. As noted, fines may be civil, administrative or criminal in nature. For various reasons, including relatively low administration costs, they form a central element of every public enforcement system. In many jurisdictions, the competition law itself grants the power to the administering or judicial authority to impose fines and sets the maximum amount of fines by statutory limit. The maximum amount of fines should be set at a sufficiently high level to achieve a significant deterrent effect. It may be expressed as a percentage of the turnover of the competition law violator, in terms of a specific figure or in reference to a variable unit, such as a country's minimum salary.

Alternative approaches in existing legislation

12. Alternative approaches in existing legislation to the maximum amount of fines are detailed in table 2.

Table 2
Alternative approaches in existing legislation: Maximum amount of fines

Country or group	
Maximum amount of fines expressed as a percentage of the competition law violator's turnover	
Australia	With regard to civil pecuniary penalties, under the Competition and Consumer Act, 2010, a business that breaches a competition law provision may be ordered to pay a civil penalty. The maximum amount of the civil penalty is the greater of: $A 10 million; or three times the total value of the benefit obtained from the commission of the offence or the act or omission in contravention of the civil prohibition; or where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in a 12-month period preceding the offence or contravention. Individuals personally involved in a breach of the competition law provisions may have to pay a penalty of up to $A 500,000. With regard to criminal penalties, a business that breaches a criminal cartel provision may be ordered to pay a criminal fine. The maximum fine is the same as the maximum civil pecuniary penalty. Individuals found by a court to have been involved in a breach of a cartel offence provision may be subject to criminal charges and imposition of a fine up to 2,000 penalty units (currently $A 340,000) per criminal cartel offence and/or imprisonment for up to 10 years.
China	With regard to fines, article 48 of the Anti-monopoly Law provides that where business operators abuse their dominant market position in violation of this Law, the Anti-monopoly Law Enforcement Agency shall impose fines. The amount of the fines may be from 1 to 10 per cent of the sales revenue in the previous year. If a monopoly agreement has not been reached or the business operators implement a concentration in violation of this Law (article 48), the Anti-monopoly Law Enforcement Agency may impose a fine of less than RMB 500,000. The amount of fine (in article 46 through article 48) shall be determined through consideration of such factors as the nature, extent and duration of the violations.
Croatia	The Competition Act was adopted in June 2009 and entered into force on 1 October 2010. The Act states that fines of up to 10 per cent of the aggregate turnover of an undertaking in the financial year preceding the year when the

Country or group	
	infringement was committed may be imposed for the most serious breaches of the Act (engaging in any activity prohibited by or abstaining from doing what is required under the Act) and fines of up to 1 per cent may be imposed for other less severe violations of the provisions in competition law.
Ethiopia	Article 26 of Trade Practice Proclamation No. 329/2003 stated that the maximum fine for competition law violations amounted to 10 per cent of the value of the total assets of the violator or 15 per cent of its annual gross total sales. In 2014, Proclamation No. 823/2013 on trade competition and consumer protection was enacted. The new competition law provides different penalties for different offences. A fine shall only be calculated based on annual turnover. The range is from 5 to 10 per cent, except for an anticompetitive agreement or vertical agreement, where the fine shall be 10 per cent of the annual turnover. The range of fines for an individual involved in direct or indirect cooperation in any prohibited practice increased, from Br 5,000–50,000 to Br 10,000–100,000.
Hungary	According to the competition law, the proceeding competition council may impose a fine on persons violating the provisions of the law. The maximum fine shall not exceed 10 per cent of the net turnover achieved in the business year preceding that in which the decision establishing the violation of the undertaking is reached or, if the undertaking is a member of a group of undertakings that is identified in the decision, of that group of undertakings. The maximum fine imposed on social organizations of undertakings, public corporations, associations or other similar organizations shall not exceed 10 per cent of the total net turnover in the preceding business year of the undertakings that are members of the group.
India	The Competition Act provides for the imposition of large penalties in cases of contravention. The Competition Commission may impose a penalty of up to 10 per cent of the average turnover for the past three financial years in a case of abuse of dominance or for any agreement that is anticompetitive. With regard to cartels, the Commission may impose on each member a penalty of up to three times its profit for each year of the duration of the cartel.
Japan	According to the Anti-monopoly Act, surcharges are calculated based on the sales value of the products or services affected during the period of violations (maximum three years) by multiplying the respective sales value by percentage factors determined according to the type of violation, scale of operations and business categories. The percentage ranges between 1 and 20 per cent for manufacturing companies, 1 and 2 per cent for wholesalers and between 1 and 3 per cent for retailers.
European Union	Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the European Commission may impose a maximum administrative fine against the infringing undertaking of 10 per cent of the undertaking's worldwide annual turnover in the preceding business year.
Maximum amount of fines expressed as a fixed sum	
Benin	According to Law No. 90-005, 15 May 1990, stipulating the conditions for commercial activities, fines of CFAF 500,000–10,000,000 may be imposed for violation of the law. The fines provided for by the draft competition legislation under discussion in 2010 were significantly higher.
Canada	Under the Competition Act, administrative penalties may not exceed Can$ 750,000 (and for each subsequent order Can$ 1 million) for an individual or Can$ 10 million (and for each subsequent order Can$ 15 million) for a corporation. With regard to criminal offences such as cartels,

Country or group	
	imprisonment for a term not exceeding 14 years or a fine not exceeding Can$ 25 million or both may be imposed.
Chile	The Competition Tribunal may impose fines of up to an amount equivalent to 20,000 annual tax units and, if sanctioning conduct prohibited under the Competition Act, an amount equivalent to 30,000 annual tax units, which is a legally defined currency for tax purposes and corresponds to the value of the monthly tax units in the last month of the commercial year multiplied by 12. The currency value is variable.
Thailand	Under the Trade Competition Act, 1999, all violations of anticompetitive offences shall be subject to imprisonment for a term not exceeding three years or a fine not exceeding B 6 million or both. In cases of repeated commission of an offence, a double penalty shall be applied.
United States	The Sherman Antitrust Act imposes criminal penalties of up to US$ 1 million for an individual and US$ 100 million for a corporation, along with up to 10 years' imprisonment. Under Federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of these amounts is over US$ 100 million.
Zambia	The Competition and Consumer Protection Act, 2010, imposes a general penalty on a person who contravenes a provision of the Act for which a specific penalty is not provided for under the Act, whereby the person is liable to a fine not exceeding 100,000 penalty units or imprisonment for a period not exceeding one year or both.
Maximum amount of fines expressed by reference to a variable unit	
Brazil	Law No. 12.529/2011 entered into force on 29 May 2012. This new competition law changed the range of fines to 0.1–20 per cent of the gross revenues of the company, economic group or conglomerate in the year prior to the start of the investigation and limited the basis for calculation of fines to the business segment in which the wrongdoing occurred. Under the new law, fines are no longer calculated based on the total gross revenues of a company but on the revenues of the business segment in which the conduct occurred. For individuals, the range of fines changed from, under the previous law, 10–50 per cent of the amount applied to the company to 1–20 per cent, under the new law.
Peru	The competition law distinguishes between different degrees of infringement. For the most serious infringements, the law provides for a fine ranging from 1,000 times the tax units (a reference unit based on the consumer price index) to 12 per cent of the annual turnover of the group of companies to which the violator belongs. The law prescribes fines based on the degree of seriousness of the infringement. For a less serious infringement, the Commission may impose a fine that ranges from 50 tax units (and does not exceed 10 per cent of the gross income received by the infringer) to a fine of 250 tax units (and does not exceed 10 per cent of the gross income obtained by the infringer). For more serious infringements, a fine of up to 700 tax units (and does not exceed 10 per cent of the gross income obtained by the infringer) may be imposed. If a cautionary measure is infringed, the Commission or court may impose a fine ranging from 10 to 125 tax units. In cases of continuing infringements, a fine of up to 700 tax units may be imposed. If corrective measures are not complied with, the Commission or court may impose a fine equal to 25 per cent of the previous fines. In cases of continuing infringements, a fine of up to the limit of 16 times the amount of the original coercive fine may be imposed.

13. In several jurisdictions, the administering authorities have published guidelines identifying the elements that are taken into account when calculating the amount of a fine. Aggravating factors, such as continuation or repetition of an infringement or an important role in its realization may lead to an increase in the fine. In this context, a high amount of illicit profit may constitute an aggravating factor. By contrast, mitigating circumstances result in a reduction of the fine. Most importantly, in several countries, cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the fine. For example, in Hungary, the Competition Council grants immunity from or reduces the fine imposed on undertakings that disclose to the Competition Authority, in a manner specified by the Act on the Prohibition of Unfair Trading Practices and Unfair Competition, agreements or concerted practices between competitors that are aimed directly or indirectly at fixing purchase or selling prices, at sharing markets, including bid-rigging, or at the allocation of production or sales quotas (Act No. LVII, 1996, articles 78/A–78/B and 88/D). On 1 April 2010, an amendment entered into force that institutionalized the informant reward scheme. Based on the amendment, persons who provide indispensable information about hard core cartels may be entitled to a reward under conditions specified by law, which must not exceed 1 per cent of the fine). In addition, a competition authority may reward a company's willingness to agree on settlement of a cartel case with a reduction in the fine, since such settlements help shorten the prosecution period and save resources. Further mitigating factors may include immediate termination of an infringement subsequent to the intervention of the competition authority and negligent violation of competition law as opposed to intentional wrongdoing. In exceptional cases, a competition authority may also take into account an undertaking's inability to pay in a specific social and economic context and may therefore reduce the fine or allow for moderated payment modalities. Fining a company to the level of bankruptcy and thereby causing a market exit would be against the primary objective of competition laws of protecting the competitive process.

Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person)

14. Recent enforcement attitudes in well-established competition law regimes towards anticompetitive agreements have involved seeking deterrence by means of very substantial fines for companies. For example, in 2008, the European Commission fined Saint-Gobain, of France, EUR 896 million for its involvement in a market-sharing cartel with other glass manufacturers. In 2009, the chip manufacturer Intel was found to have infringed article 102 of the Treaty on the Functioning of the European Union and, consequently, a fine of over €1 billion was imposed. In addition, a trend towards higher fines may also be observed in some younger competition law regimes. For example, the Competition Commission of India imposed a cumulative penalty of more than US$ 1 billion on cement manufacturing companies and the trade association of cement manufacturers (Builders Association of India versus Cement Manufacturers' Association and Others, Case No. 29/2010).

15. Although most competition legislation provides for civil or administrative sanctions in the case of anticompetitive behaviour, there is a trend towards criminalization. Until recently, only the United States imposed criminal sanctions involving imprisonment on individuals in cases of competition law violation. The Sherman Antitrust Act provides for criminal penalties (for violations of sections 1 and 2) and an infraction may be prosecuted as a felony punishable by a corporate fine and up to 10 years' imprisonment for individuals. A number of other countries had provisions in place without applying them. Currently, more countries, including Canada, Israel, Japan and the United Kingdom, are imposing criminal sanctions on individuals, to fight hard core cartels. The United Kingdom has

introduced, under Enterprise Act, 2002, criminal sanctions for individuals who commit certain clearly defined anticompetitive offences. In 1999, Thailand imposed an imprisonment sanction of up to three years for all anticompetitive offences, and the sanction is doubled in cases of repetition. In 2008, jail terms were imposed for the first time by courts of the United Kingdom on individuals who had participated in an international cartel. In 2009, the Parliament of Australia passed legislation (Trade Practices Amendment (Cartel Conduct and Other Measures) Act) to criminalize specific cartel conduct, including price-fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories and bid-rigging.

16. Proponents of criminal sanctions for individuals argue that these are the most effective motivations for compliance by corporate managers and therefore corporations. Since the current level of fines imposed on companies in jurisdictions such as the United States and the European Union could not be raised further without causing economic damage, and since fines would ultimately be passed on to consumers, greater deterrence by other means would be needed. Therefore, personal liability on the part of wrongdoers would have to play a more important role. In this context, it is also argued that pecuniary sanctions imposed on individuals would not result in the desired deterrence, since there is a high risk that companies would assume the respective fines on behalf of their employees. This risk may be mitigated by a respective prohibition addressed to the company.

17. However, for a number of reasons, a State may opt against criminal sanctions for competition law violations. First, it may not be appropriate to provide for criminal sanctions when competition law is new and the business community has not had a reasonable period to familiarize itself with the new legal obligations. Second, until competition law principles are widely accepted as an important part of the legal and economic environment, the criminalization of violations may not be in line with social and legal norms. Third, the costs of criminal sanctions – in particular, imprisonment – may appear too high in comparison with the costs of other forms of sanctions. Another concern put forward against criminal sanctions in competition cases relates to increased procedural requirements, for example a higher standard of proof to be respected in criminal cases. These factors may make the prosecution of competition law violations more difficult and costly and decrease the number of successful cases. Each of these arguments may have some validity.

18. The power to impose imprisonment is normally vested in the judicial authority. In certain countries, such as Japan and Norway, the power to impose terms of imprisonment is reserved for the judicial authorities on the application of the administering authority.

Remedies

19. In contrast to sanctions, remedies that aim at maintaining or restoring competition in the future are not punitive in nature. Remedies serve to put a competition law infringement to an end, compensate victims and cure the competitive harm. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing or time-limited remedies designed to modify or constrain the behaviour of firms (in some jurisdictions, behavioural remedies are referred to as conduct remedies). If such remedies require any ongoing supervision or monitoring, the cost for both the authority and undertakings may be high. Some remedies, such as those relating to access to intellectual property rights, are particularl difficult to categorize on this basis.

20. Depending on the legal framework, competition authorities may impose remedies unilaterally, or may negotiate them with the parties concerned upon a proposal made by the parties (undertakings or commitments). Undertakings or commitments are sometimes considered as sanctions. However, taking into account that they primarily seek to reinstate competition where it has been distorted by an anticompetitive practice, undertakings or commitments may be classified as remedies.

21. In addition to fines and imprisonment, Chapter XI (II) of the Model Law on Competition lists a number of measures that actually qualify as remedies, according to the current understanding of most competition laws.

Interim orders or injunctions

22. Interim orders or injunctions generally fall under the category of behavioural remedies. They may be granted as a preliminary measure during a pending competition case in order to prevent a company from violating or continuing to violate the competition law. In different competition law regimes, different enforcement bodies are vested with the power to impose interim orders or injunctions. In countries with common law systems, it is mainly the courts who exercise this power. For example, in Canada, the Director of Public Prosecutions may, in urgent situations, apply for an interim injunction to the competent court to temporarily halt behaviour that constitutes or is directed toward the commission of an offence. In civil law countries, competition authorities may have such powers. For example, in Germany, the Federal Cartel Office may pronounce interim measures according to section 32a of the Act Against Restraints of Competition. In Hungary, the Competition Council may, as an interim measure, prohibit in its injunction the continuation of the illegal conduct or order the elimination of the unlawful situation, if prompt action is required for the protection of the legal or economic interests of the interested persons or because the formation, development or continuation of economic competition is threatened. According to the Act on the Prohibition of Unfair Trading Practices and Unfair Competition, the Competition Council may also require a bond as a condition, if the interim measure was required by the party under investigation (articles 72 (1) (c) and 72 (2)). Although India has a common law system, the Competition Commission is empowered to issue interim orders upon being satisfied that a contravention has been committed and continues to be committed or there is a likelihood of the same, and the Commission may grant temporarily restraint orders. Such orders may be effective until the conclusion of the inquiry or until further orders, even without giving notice to such party, where it deems it necessary.

Permanent or long-term orders0 to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.

23. In effect, cease and desist orders are similar to injunctions and serve as a means to bring a competition law infringement immediately to an end. For instance, a competition authority may order cartellists to stop price-fixing agreements or may order a dominant undertaking to stop the anticompetitive bundling of certain products. Most competition legislation provides for cease and desist orders.

24. In certain situations, however, the conduct under scrutiny has already caused anticompetitive harm, and it may be necessary to order specific measures in order to restore competition. In this context, chapter XI (II) (iv) of the Model Law on Competition refers to orders to remedy a violation by positive conduct, public disclosure or apology, etc. The imposition of a behavioural remedy compels the undertaking to act in a particular way.

This includes, for example, rebate systems, amendments to price structures, changes to trading conditions and granting of access to infrastructure or intellectual property.

25. Although behavioural remedies may be formulated to address a specific competitive concern, they are often considered inconvenient from the perspective of monitoring, given that they require ongoing monitoring, which affects a competition authority's resources.

Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts)

26. Divestiture in merger cases is the most frequent structural remedy. Under a pre-merger notification system, competition authorities typically assess the likely effects of a notified transaction on competition. If this prognosis reveals competitive concerns, they may be addressed through appropriate remedies, such as divestiture of specific parts of an undertaking, for example a production site or distribution network. Competition legislation varies on the question of whether divestitures must be proposed by the notifying parties and then tested by the competition authority or whether the authority is granted the power to unilaterally impose a divestiture in its clearance decision. Taking into account the fact that the parties to a proposed merger are primarily responsible for shaping the transaction, it may be advisable for competition authorities to rely upon the parties to design an appropriate remedy in dialogue with the competition authority.

27. In Japan, for example, in many cases, parties voluntarily hold prior consultations with the Fair Trade Commission in advance of formal notifications. The Commission carries out inspections at an early stage, and if it concludes that the transaction is problematic, indicates its competition concerns to the parties, without reaching any final clearance decision. The parties then propose a remedial measure on a voluntary basis, the effectiveness of which is assessed by the Commission.

28. Under post-merger notification systems, a competition authority only intervenes once the transaction in question has already been completed. Thus, any remedy to competitive concerns may only be designed and decided upon after implementation of the merger, which may pose certain inconveniences from a practical perspective. In a situation where a divestiture may not remedy the competitive harm caused by a merger, the competition authority may have to order the rescission or dissolution of the merger, which involves the difficulty of "unscrambling the eggs".

29. In merger cases, rescission constitutes an ultima ratio if competition cannot be safeguarded by any other means. Typically, it may be applied if the parties to an anticompetitive merger have not respected a statutory waiting period in a pre-merger notification system and have implemented the proposed transaction without the required approval by the competent authority. As noted, rescission may also occur under post-merger notification systems.

Alternative approaches in existing legislation

30. Alternative approaches in existing legislation to structural remedies in merger cases are detailed in table 3.

Table 3

Alternative approaches in existing legislation: Structural remedies in merger cases

Country or group	*Structural remedies in merger cases*
Canada	If the Competition Bureau believes that a merger is likely to prevent or lessen competition substantially, the Commissioner may either apply to the Competition Tribunal to challenge the merger under the applicable provisions of the Competition Act or negotiate remedies with the merging parties in order to resolve competition concerns on consent (section 105). If the Tribunal finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially, it may issue an order prohibiting the merger or a remedial order requiring the parties to dissolve the merger or make divestitures. Failure to file a merger pre-notification (without good and sufficient cause) when one is required is a criminal offence, punishable by a fine of up to Can$ 50,000. Parties to a proposed transaction that exceeds certain monetary thresholds must notify the Commissioner and wait for a statutory review period to expire before the transaction may close. Non-compliance with the waiting period rules may lead to an order requiring the parties to dissolve the merger, make divestitures or pay an administrative monetary penalty of up to Can$ 10,000 for each day of non-compliance. Further, the Tribunal may grant an interim order preventing the parties from closing the merger upon their failure to file a merger pre-notification.
Mauritius	In assessing the competitive effects of a merger, the Competition Commission considers the foreseeable future. For most industries, this may involve a period of two to five years. If any anticompetitive effects are expected to last less than two years, the Commission normally allows the merger to proceed, although if the effects are significant, it may lead to a significant lessening of the competition finding and the Commission may impose temporary remedies. In some cases, such as industries involving long lead times and long-term contracts, the foreseeable future might be longer than five years. Proposed mergers notified to the Commission may be blocked if they are expected to result in a significant lessening of competition and if there is no more effective remedy. If a significant lessening of competition is expected only in some markets, then the Commission may block only part of the deal, allowing the merger to be completed subject to certain parts of the target enterprise remaining independent. Alternatively, the merger may be allowed to be completed in full, but the merged enterprise would then be required to sell off part of the enterprise within a specified period. In both cases, the Commission applies the same principles to determining the package of assets that must be removed from the merged enterprise as set out below. In selecting a remedy or package of remedies, the Commission considers the effectiveness, timeliness and proportionality of implementation costs to expected benefits of the remedy. Remedies applied by competition authorities are often divided into structural remedies such as divestment, which aim to restore or enhance competition by changing the market structure, and behavioural remedies, which aim to change the behaviour of enterprises through orders or contractual undertakings. Generally, structural remedies require little if any monitoring once the structural change has taken place, while behavioural remedies normally require the Commission or a nominated agent to monitor compliance. The Commission may also make non-binding recommendations to the Government. The divestment of assets may represent a highly effective means to create a more competitive market structure than would otherwise exist. However, the Commission recognizes that forced divestment represents a considerable intervention in property rights. It therefore does not require divestment in

Country or group	*Structural remedies in merger cases*
	such cases unless it is satisfied that no other equally effective remedy exists and that such intervention is not disproportionate to the expected benefits. The package of assets must be viable, whether in independent ownership or under the control of an existing actor in the market. Viability requires that the divested business be able to offer an effective competitive threat to other producers in the market, while remaining profitable. The Commission allows enterprises as much freedom as possible in choosing the manner of divesting their assets, as long as the effectiveness of the remedy is preserved and the divestment proceeds in a timely fashion. The Commission may also place restrictions on the types or specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the Commission's approval of the preferred buyer. The Commission is likely to reject potential buyers if it believes they will not use the assets to compete effectively in the relevant markets in which it has identified concerns. Divestment remedies normally require no monitoring or enforcement by the Commission once the sale of assets is complete. However, as part of the divestiture order or accepted undertakings, the Commission normally specifies that the divested assets cannot be repurchased by the divesting enterprise or otherwise come back under its control. This prohibition is limited by a sunset clause, typically of 10 years.
United States	Divestiture constitutes a remedy in cases of unlawful mergers and acquisitions. It is considered a structural remedy, requiring some dismantling or sale of the corporate structure or property that contributed to the continuing restraint of trade, monopolization or acquisition. Structural relief may be subdivided into the three categories of dissolution, divestiture and divorcement. Dissolution generally refers to a situation where the dissolving of an allegedly illegal combination or association is involved and may include the use of divestiture and divorcement as methods of achieving that end. Divestiture refers to situations where the defendants are required to divest themselves of property, securities or other assets. Divorcement is commonly used to indicate the effect of a decision where certain types of divestiture are ordered and is especially applicable in cases where the purpose of the proceeding is to secure relief against antitrust abuses flowing from integrated ownership or control, such as vertical integration of manufacturing and distribution functions or the integration of the production and sale of diversified products unrelated in use or function. This type of remedy is not created in express terms of statute. The remedies may include negotiating agreements by the enforcing agencies to address the competition concerns while permitting the transaction to be consummated. The usual course involves the divesture of overlapping assets, imposition of restrictions or affirmative obligations or the licensing of intellectual property rights. However, section 4 of the Sherman Antitrust Act and section 5 of the Clayton Antitrust Act empower the Attorney-General to institute proceedings in equity to "prevent and restrain" violations of the antitrust laws and state that "such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined otherwise prohibited". Furthermore, aside from these general statutory authorizations, the essence of equity jurisdiction is the power of the court to change the decree to the necessities of the particular case. Thus, invocation by the Government of the general authority of a court of equity under the Sherman Antitrust Act or Clayton Antitrust Act enables the court to exercise wide discretion in framing its decree so as to give effective and adequate relief (see C Oppenheim, GE Weston and JT McCarthy, 1981, *Federal*

Country or group	*Structural remedies in merger cases*
	Antitrust Laws: Cases, Text and Commentary (Saint Paul, Minnesota, West Publishing Company) and Bureau of Competition of the Federal Trade Commission, 1999, A study of the commission's divesture process, available at https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf (accessed 18 May 2015)).
European Union	European Council Regulation No. 139/2004 on the control of concentrations between undertakings provides the legal basis for merger control in the European Union. The regulation prohibits mergers and acquisitions that would significantly reduce competition in the single market, for example if they created dominant companies that were likely to raise prices for consumers. With regard to mergers, the Regulation expressly provides that the European Commission may decide to declare a concentration compatible with the European Union market. During the first or second phase of an investigation, if there are competition concerns, the merging companies may offer remedies that guarantee continued competition on the market. However, the European Commission is not in a position to unilaterally impose any conditions on an authorization decision. The European Commission only analyses whether the proposed remedies are viable and sufficient to eliminate competition concerns. It also takes into account the views of market participants in a market test. If remedies are accepted, they become binding upon the companies. An independent trustee is then appointed to oversee compliance with these commitments. After the investigation, the European Commission may either unconditionally clear the merger or approve the merger subject to remedies or prohibit the merger if no adequate remedies to the competition concerns have been proposed by the merging parties.

Restitution to injured consumers

31. Some competition legislation allows the competent authority to order restitution to those who suffered harm resulting from the anticompetitive conduct. For example, in Indonesia, administrative measures provided for in article 47 of the law concerning the Ban on Monopolistic Practices and Unfair Business Competition (No. 5/1999) include the stipulation of a compensation payment by the competition authority. Such a restitution order, as part of public enforcement, is different from damages, which may be accorded by a civil court as part of private competition law enforcement. The latter is referred to in chapter XIII of the Model Law on Competition.

Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons

32. As noted, well-established competition law systems have begun promoting private enforcement of competition law, that is, private actions for damages by those who have suffered harm resulting from anticompetitive conduct, in particular by hard core cartels. Such private actions are generally initiated in civil courts and predominantly take the form of follow-on actions, i.e. actions that follow public prosecution in a cartel case.

33. For the purposes of procedural efficiency, competition legislation may stipulate that the findings of a competition authority or court that established anticompetitive behaviour

should be binding for follow-on claims for damages. This means that claimants for damages do not need to prove again the anticompetitive behaviour by the defendant while claiming damages before the court and that claimants need only substantiate and prove the damage they suffered from the infringement of the competition law. For example, in Germany, according to the Act Against Restraints of Competition, if damages are claimed for a competition law violation, the court shall be bound by a finding of such a violation in a final decision of any national cartel authority of a member State of the European Union or of the European Commission. In some countries, private action for damages is only allowed subsequent to a competition authority's decision, for example in Costa Rica, Japan and South Africa.